

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

DANIEL W. ATKINS

PLAINTIFF

v.

CAUSE NO. 1:18CV227-LG-LRA

**NANCY BERRYHILL,
ACTING COMMISSIONER
OF SOCIAL SECURITY**

DEFENDANT

**ORDER ADOPTING IN PART AND REJECTING
IN PART REPORT AND RECOMMENDATION**

BEFORE THE COURT is the [16] Report and Recommendation entered by United States Magistrate Judge Linda R. Anderson. Judge Anderson recommends that this social security appeal filed by Atkins should be dismissed without prejudice for failure to prosecute. Atkins did not file an objection and the copy of the Report and Recommendation mailed to him was returned as undeliverable. After reviewing the record in this matter and the applicable law, the Court finds that the Report and Recommendation should be adopted to the extent that this appeal should be dismissed. However, the appeal must be dismissed with prejudice.

DISCUSSION

Atkins filed this pro se appeal of the Social Security Administration's denial of benefits on July 9, 2018. Judge Anderson entered an [4] Order requiring Atkins to file his brief on June 5, 2019, thirty days after the administrative record was filed. Atkins filed a [12] Motion asking the Court to appoint counsel. Judge Anderson entered an Order requiring Atkins to show cause why his appeal should

not be dismissed for failure to file a timely brief. In the alternative, she granted Atkins additional time to file a brief and explained what should be contained in the brief. She also denied Atkins' [12] Motion to Appoint Counsel. Atkins filed a second [14] Motion to Appoint Counsel, which was also denied. Atkins never filed a brief but sent a letter stating that he did not understand what he needed to include in his brief and once again requested appointed counsel. Several months later, Judge Anderson entered the present Report and Recommendation in which she recommended dismissal of this appeal without prejudice for failure to prosecute.

Dismissal of a social security appeal pursuant to Fed. R. Civ. P. 41(b) likely operates as a dismissal with prejudice pursuant to 42 U.S.C. § 405(g). *Veronica B. v. Comm'r of Soc. Sec. Admin.*, No. 3:19-CV-1341-S-BT, 2019 WL 5967847, at *2 (N.D. Tex. Oct. 10, 2019). Therefore, this Court can dismiss Atkins' appeal "only on a showing of a clear record of delay or contumacious conduct by the plaintiff . . . , and where lesser sanctions would not serve the best interests of justice." *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 417 (5th Cir. 2006).

The record reflects a clear record of delay on the part of Atkins. This appeal has been pending for over eighteen months and Atkins has not attempted to file a brief despite clear instructions from the Court. He has not contacted the Court at all in the past six months, and he has moved to a new address without providing the Court with his new contact information. Thus, Atkins has abandoned his appeal. Lesser sanctions would have no effect here, because the Court has no way of

contacting Atkins in order to implement the sanctions. As a result, dismissal with prejudice is warranted in this matter.

Judge Anderson's Report and Recommendation is adopted as the opinion of this Court to the extent that she recommends dismissal of the appeal. The Report and Recommendation is respectfully rejected to the extent that it recommends dismissal without prejudice, as any dismissal at this stage of the appeal would effectively constitute a dismissal with prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the [16] Report and Recommendation entered by United States Magistrate Judge Linda R. Anderson is **ADOPTED IN PART AND REJECTED IN PART** as set forth herein. This appeal is **DISMISSED WITH PREJUDICE**. The Court will enter a separate judgment pursuant to Fed. R. Civ. P. 58.

SO ORDERED AND ADJUDGED this the 28th day of February, 2020.

s/ *Louis Guirola, Jr.*

LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE